Atlantic Scope (M) Sdn Bhd v Director General of Customs and Excise Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2-24-10-94
SITI NORMA YAAKOB J
5 OCTOBER 1994

Customs and Excise *— Forfeiture — Security deposit — Deposit paid for release of seized prohibited goods — Whether deposit can be forfeited if importer of goods not charged with offence — Customs Act 1967 ss 115(1)(b), 127(1A), 131(3)*

The plaintiff imported 1,840 cartons of cigarettes, ie prohibited goods, without a licence. The goods were kept in the free trade zone in Port Klang pending their onward transmission. The defendant issued a notice seizing the goods pending investigations under s 114(1) of the Customs Act 1967 ('the Act') and subsequently, under s 115(1)(b) of the Act, informed the plaintiff that the goods would be returned to the plaintiff on condition that: (i) the plaintiff pay the open market value of the goods, customs duty and tax, amounting to RM1,158,224.80 as security ('the security'); and (ii) the goods must be re-exported. The plaintiff paid the security and, after the release of the goods, re-exported them. The defendant later informed the plaintiff that it had committed an offence under s 135(1)(a) of the Act for importing prohibited goods and that if it paid a compound fee of RM5,000 within 14 days, it would not be prosecuted, but the seized goods were to be forfeited; however, as they had already been re-exported, the security would be forfeited. The plaintiff refused to pay the compound fee, contending that: (i) it had not committed any offence; (ii) the security was not forfeitable since the plaintiff had already complied with the defendant's conditions regarding the release of the goods; and (iii) the Free Zone Act 1990 applied as the goods were stored in the free trade zone area. It applied for a declaration to that effect as well as the return of the security.

Held, allowing the plaintiff's application in part:

(1) Bearing in mind the subject matter of the dispute and the notices issued under ss 114 and 115(1)(b), the defendant must be acting under the provisions of the Act and not the Free Zone Act 1990.

(2) Under s 131(3) of the Act, only goods seized are forfeitable but not the security. It appeared that the security under s 115(1)(b) was to cover the situation where the court made an order for forfeiture of the security under ss 127(1A) or 128(4) of the Act.

(3) In this case, under s 127(1A), the court could only consider forfeiture of the security upon proof of the commission of an offence against the Act or any regulation made thereunder. The defendant did not have the power to forfeit. If he wanted to

forfeit the security, he should have charged the plaintiff in court and urged the court to order forfeiture. Instead, he had elected to compound the offence. Therefore, the security was to be returned to the plaintiff within one month, less the sum of RM5,000 in compound fees which the plaintiff had subsequently agreed to pay.

[Bahasa Malaysia summary

Plaintif telah mengimport 1,840 karton rokok, ie barangan larangan, tanpa lesen. Barangan itu telah disimpan di dalam zon perdagangan bebas di Pelabuhan Klang sementara menunggu penghantaran seterusnya. Defendan telah mengeluarkan suatu notis untuk menyita barangan itu sementara menunggu penyiasatan di bawah s 114(1) Akta Kastam 1967 ('Akta itu') dan kemudiannya telah memberitahu plaintif di bawah s 115(1)(b) Akta itu bahawa barangan tersebut akan dikembalikan kepada plaintif atas syarat bahawa: (i) plaintif membayar nilai pasaran terbuka barangan itu, duti kastam dan cukai, yang berjumlah RM1,158,224.80 sebagai jaminan ('jaminan itu'); dan (ii) barangan itu mesti dieksport semula. Plaintif telah membayar jaminan itu dan, selepas barangan itu dilepaskan, telah mengeksportkannya semula. Defendan kemudiannya telah memberitahu plaintif bahawa ia telah melakukan suatu kesalahan di bawah s 135(1)(a) Akta itu kerana mengimport barangan larangan dan jika ia membayar suatu fee kompaun sebanyak RM5,000 dalam masa 14 hari, ia tidak akan didakwa, tetapi barangan yang disita itu akan dilucut hak; bagaimanapun, oleh kerana barangan tersebut telahpun dieksport semula, jaminan itu akan dilucut hak. Plaintif enggan membayar fee kompaun itu dan menegaskan bahawa: (i) ia tidak melakukan sebarang kesalahan; (ii) jaminan itu tidak boleh dilucut hak kerana plaintif telahpun mematuhi syarat yang ditetapkan oleh defendan berkaitan dengan pelepasan barangan itu; dan (iii) Akta Zon Bebas 1990 terpakai kerana barangan itu telah disimpan di dalam zon perdagangan bebas. Ia telah memohon untuk suatu deklarasi yang memerintahkan demikian dan juga untuk pengembalian jaminan itu.

Diputuskan, membenarkan sebahagian daripada permohonan plaintif:

(1) Memandangkan perkara yang dipertikaikan itu dan notis yang telah dikeluarkan di bawah ss 114 dan 115(1)(b), defendan semestinya bertindak di bawah peruntukan Akta itu dan bukannya Akta Zon Bebas 1990

(2) Di bawah s 131(3) Akta itu, hanya barangan yang disita boleh dilucut hak dan bukannya jaminan itu. Kelihatan bahawa jaminan di bawah s 115(1)(b) itu adalah untuk meliputi keadaan di mana mahkamah membuat suatu perintah pelucuthakan jaminan itu di bawah ss 127(1A) atau 128(4) Akta itu.

(3) Di dalam kes ini, mengikut s 127(1A), mahkamah hanya boleh mempertimbangkan pelucuthakan sesuatu jaminan atas bukti bahawa suatu kesalahan telah dilakukan terhadap Akta itu atau sebarang peraturan yang dibuat di bawahnya. Defendan tidak mempunyai kuasa untuk melucut hak. Jika beliau ingin melucut hak jaminan itu, beliau seharusnya menuduh plaintif di mahkamah dan mendorong mahkamah supaya memerintahkan suatu pelucuthakan. Sebaliknya, beliau telah memilih supaya kesalahan itu dikompaun. Oleh yang demikian, jaminan itu mesti dikembalikan kepada plaintif dalam masa satu bulan, tolak jumlah RM5,000 sebagai fee kompaun yang plaintif kemudiannya telah bersetuju membayar.]

[*Editorial Note*: The defendant has appealed to the Court of Appeal.]

Legislation referred to

Customs Act 1967 ss 114(1), 115(1)(b), 127(1A), 128(4), 131(1), (3), 135(1)(a)
Free Zone Act 1990

Harpal Singh Grewal (*Avinder Singh Gill* with him) (*AJ Ariffin, Choo & Harpal*) for the plaintiff.
Hazman Ahmad (Federal Counsel) for the defendant.

Cur Adv Vult

Siti Norma Yaakob J: The plaintiff in these proceedings is involved in the business of import and export. In June 1993, the plaintiff imported 1,840 cartons of cigarettes from Singapore and the goods were kept in a godown in the free trade zone in Port Klang, pending their onward transmission to their final destination.

On 20 August 1993, the defendant issued a notice seizing and detaining the goods pending investigations under s 114(1) of the Customs Act 1967 ('the Act'). Cigarettes are prohibited goods and a licence is required for their importation. It is not disputed that the plaintiff did not obtain such a licence at the time of their importation.

On 2 September 1993, the defendant, acting under s 115(1)(b) of the Act, informed the plaintiff that he had decided to exercise his discretion by returning the goods to the plaintiff on condition that the plaintiff pay the open market value of the goods, the customs duty payable and the tax payable amounting to RM1,158,224.80 as security and that the goods must be re-exported. The plaintiff was also informed that if it failed to take back the goods, the defendant would sell such goods in the open market and the proceeds would be kept by the defendant pending the outcome of any prosecution or claim. The plaintiff was given seven days within which to respond to the defendant's letter.

On 24 September 1993, the plaintiff deposited the security with the defendant and, following the release of the goods, the plaintiff re-exported the goods to Japan on 28 September 1993. A

On 19 January 1994, the defendant informed the plaintiff that it had committed an offence under s 135(1)(a) of the Act for importing prohibited goods and for this offence, the defendant was prepared to compound the offence with a compound fee of RM5,000. The plaintiff was also informed that if it was prepared to pay the compound fee within 14 days, it would not be prosecuted. However, the seized goods would be forfeited but as they had already been re-exported, this would mean that the security deposited by the plaintiff would be forfeited. B

The plaintiff refused to pay the compound fee as it maintained that it had not committed any offence and since it had already complied with the defendant's conditions regarding the release of the goods, the security deposit was not forfeitable and, in these proceedings, the plaintiff seeks a declaration to that effect as well as the return of the deposit and other consequential reliefs. C D

The first issue taken is whether the Free Zone Act 1990 ('the 1990 Act') or the Act apply to the facts of this case. The plaintiff contends that the 1990 Act applies, as the goods were stored in the free trade zone area. This does not necessarily mean that the defendant was acting under ss 4 and 5(2) of the 1990 Act when they issued the notice dated 20 August 1993, seizing and detaining the goods. The notice itself does not specify under which Act the defendant was acting, but bearing in mind the subject matter of the dispute and that the notice originated from the defendant, he must be acting under s 114 of the Act, which empowers the defendant to seize goods which was the subject matter of an offence pending investigations into the offence. If there had been any doubt as to the powers of the defendant, that doubt had been cleared when he issued the second notice dated 2 September 1993, where he specifically stated that he was acting under s 115(1)(b) of the Act when he decided to release the goods subject to the conditions that a security be furnished and the goods be re-exported. E F

Perhaps the only substantial issue raised in these proceedings is whether the defendant has the right to forfeit the security deposited as he had threatened to do in the letter dated 19 January 1994, particularly when the goods have already been re-exported. G

The plaintiff has admitted that it imported the goods, a prohibited item, without a licence, an offence punishable under s 115(1)(a) of the Act. Section 131(1) of the Act empowers the defendant to compound such an offence and that power was exercised by the defendant when he indicated he was prepared to accept a RM5,000 compound fee from the plaintiff. Under sub-s (3) of the same section, on payment of such a sum, the goods seized shall be released and no further action shall be taken against the plaintiff or property, unless the property consists of goods the import of which is prohibited, in which case such goods shall be forfeited. Provided that where the prohibition is conditional upon a licence being issued in respect of the import of such goods, the defendant can release such goods if a licence is subsequently issued. H I

In this instance, the plaintiff refused to pay the compound fee and it was only before me that it decided to do so. There is no evidence that a licence had been subsequently issued. Under s 131(3), only the goods are forfeitable but not the security deposited. This brings me to the purpose as to why the security was asked for in the first place. Under s 115(1)(b) of the Act, it would appear that the security, which represents the open market value of the goods, the customs duty payable and any tax payable, is to cover the situation where the court makes an order for forfeiture of such an amount under ss 127(1A) or 128(4) of the Act.

Section 128(4) is not applicable to the facts of this case. Section 127(1A) empowers the court before whom a prosecution has been held, to order a forfeiture of the amount secured under s 115(1)(b) if it is proved that an offence had been committed. Thus, only a court can consider forfeiture of the security deposited following the successful proof of the commission of an offence against the Act or any regulation made thereunder, though not necessarily the conviction of the offender. Such power to forfeit does not lie with the defendant. If the defendant wanted to forfeit the security deposited, he should have charged the plaintiff in court and upon proof that an offence had been committed against the Act, urged the court to order a forfeiture. This was not done and, instead, the defendant elected to have the offence compounded and since he has no power to forfeit the security deposited, I allowed the plaintiff's application to the extent that the security deposited be returned to the plaintiff within one month, less the sum of RM5,000 in compound fees which the plaintiff was prepared to pay, and that the defendant also pay the costs of these proceedings to the plaintiff.

Order accordingly.

Reported by Anne Khoo